IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.681 OF 2007
IN
NOTICE OF MOTION NO.1694 OF 2007
IN
S.C. SUIT (STAMP) NO.1791 OF 2007

Mr. Mohd. Iqbal Ali Mohd. Wadia... Appellant
Versus
1.Mr.Mohd. Tarique (Nabi)
Khan & Anr. ...Respondents

Mr. V.P. Sawant i/b. Shri Rajesh Singh and Shri Vinod Singh, for the Appellant
Shri Anil C. Singh i/b. Shri Devendra Sharma for the Respondent Nos.1 and 2

CORAM : S.R. SATHE,J.
DATED : 20/09/2007

P.C. :-

1. Heard both the learned Advocates at length.

2. The matter is heard finally at admission stage.

3. The Appellant-original Plaintiff in Short Cause Stamp No. 1791 of 2007 has preferred this appeal against the order passed by the Judge, City Civil Court, Mumbai whereby Plaintiff's Notice of Motion asking for temporary injunction restraining defendants from dealing with, disposing of or parting with the

possession of the property bearing Survey No.172, Hissa No.12, 33 and 34 and Survey No.176, Hissa No.4 and 10 admeasuring 1672.20 sq.meters situated at village Kole Kalyan, Kalina-Vakola Road, Santacruz, Taluka Andheri was dismissed. For the sake of convenience, hereafter, the parties shall be referred to as 'Plaintiff' and 'Defendants'.

4. The brief facts giving rise to this appeal are as under :-

Plaintiff is a builder and developer doing business in the name and style of M/s. Star Associates (builder and developers). The defendant No.1 is the constituted attorney of defendant No.2 who is the owner of the suit land, executed MOU and an agreement for development both dated 10/01/2005. A general power of attorney was also executed on the same day in favour of the Plaintiff. As per the agreement between Plaintiff and defendant, Plaintiff agreed to pay Rs.30 lakhs to defendant for grant of development rights on the suit land. According to Plaintiff, though, he paid Rs.25 lakhs out of the same and defendant No.1 acknowledged the receipt of the same, the defendant failed to comply

their part of MOU and the agreement for development. The balance consideration of Rs. 5 lakhs was to be paid by Plaintiff after compliance of the other stipulations by the defendants. It is Plaintiff's case that inspite of the execution of the said agreement, defendant did not hand over the original document in respect of the right, title and interest of the defendants. The defendant No.2 did not remain present before the Registrar of assurance for registration of the necessary documents. Plaintiff came to know that defendants started negotiating with some other party for development of the suit land. They also tried to create third party interest in the suit land. Plaintiff, therefore, filed the present suit for declaration that defendants have no right to create third party interest in respect of the suit property and for restraining defendants from dealing with, disposing of or parting with the position of the suit property and from creating third party interest in the same.

5. The Plaintiff also filed Notice of Motion No.1694 of 2007 and prayed for temporary injunction

restraining defendants from creating third party interest or parting or dealing with the possession of the suit property till the disposal of the suit.

6. The defendants filed their reply and contended that the Plaintiffs have in fact cancelled the suit agreement by their letter dated 17/05/2005. They also contended that amount of Rs.15 lakhs has been returned to the Plaintiff and as such Plaintiff is not entitled to get any relief. The defendants further contended that the Plaintiff has suppressed the material fact and as such he is not entitled to get discretionary relief of temporary injunction. The defendants, therefore, contended that Plaintiff has not made out any prima facie case for granting temporary injunction in his favour and the balance of convenience is also not in his favour. They, therefore, prayed for the dismissal of the Notice of Motion.

7. After hearing the arguments of both the learned Advocates and considering the documents produced by them the learned Trial Judge came to the conclusion that the Plaintiff has suppressed the material facts.

He has in fact admitted in the criminal case filed by him that he has received the amount of Rs.15 lakhs. He, however, did not disclose this fact. It was, therefore, observed that Plaintiff has failed to make out any prima facie case for granting temporary injunction in his favour. The learned Trial Judge, therefore, dismissed the Notice of Motion.

8. Being aggrieved by the said order the Plaintiff has filed the present appeal. In this appeal before me, Shri V.P.Sawant, learned Advocate for the Plaintiff has urged only two points. Firstly, he submitted that the learned Trial Judge has failed to consider the fact that his predecessor had already granted ad-interim relief in favour of Plaintiff. The defendants preferred appeal from order bearing No.544 of 2007 and also filed Civil Application therein for grant of ad-interim relief. However, the said AO was withdrawn by the Respondents and as such Plaintiff was entitled to temporary injunction as prayed. According to him, learned Trial Judge ought to have taken into consideration the fact that the Plaintiff has paid Rs.25 lakhs to the defendants and as such by virtue of

the MOU, they are in fact having a charge on the suit property. Lastly, he submitted that as MOU and the agreement are still in subsistence, the learned Trial Judge ought to have held that the defendants are not entitled to create any third party interest. He, therefore, submitted that the appeal be allowed and the temporary injunction as prayed be granted against the defendants. As against this, learned Advocate for the defendants supported the order passed by the learned Trial Judge.

9. It is an admitted fact that agreement, MOU and power of attorney have been executed between the parties on 10/01/2005. The Plaintiff has come out with a case that defendants are trying to create third party interest in the suit property and as such it is necessary to issue temporary injunction against the defendants. It is also alleged by the Plaintiff that when the suit agreement was cancelled the defendants issued three cheques of Rs.5 lakhs each for returning the earnest amount received by defendants towards the suit agreement. However, the said cheques were dishonoured and as such Plaintiff filed criminal case

against defendants for the offence punishable under section 138 of the Negotiable Instruments Act and defendant No.1 was even convicted in the same. However, the learned Advocate for the defendant has argued before me that in the instant case the Plaintiff has suppressed the material fact and as such the Trial Court has rightly refused to grant the discretionary equitable relief of temporary injunction in favour of Plaintiff.

10. From the perusal of the record and in particular from the admissions given by the Plaintiff in the Criminal Case filed by him, it is very clear that cheques which were given by the defendant to Plaintiff and which were dishonoured were in fact not in respect of the suit, MOU and agreement. However, for making out a false case Plaintiff suppressed the real facts and tried to mislead the Court and showed that cheques issued by the defendant No.1 were towards the suit transaction. What is more to be noted is that in his deposition in the criminal case, the Plaintiff finally even admitted that he has received the amount of Rs.15 lakhs from the defendant and the same were in

respect of some other transaction between Plaintiff and defendant. So, it is very clear that Plaintiff has not come to the Court with clean hands.

11. It is the contention of the defendant that Plaintiff had in fact issued a letter dated 17/05/2005 and informed that the suit agreement has been cancelled. However, he suppressed the said material fact and tried to secure temporary injunction. The learned Advocate for the Appellant-original Plaintiff submitted that once the defendant No.1 has admitted that he has received the amount of Rs.25 lakhs towards the suit agreement then in order to protect the interest of the Plaintiff, it is necessary to grant temporary injunction in Plaintiff's favour. According to him, even as per the provisions of Section-55(6)(b) of the Transfer of Property Act charge of the said amount is statutorily created on the property for which the said amount was received by the defendant i.e. seller. For this proposition he has placed reliance on a case **Videocon Properties Ltd. V/s. Dr. Bhalchandra Laboratories and ors. (2004) 3 SCC 711**. The facts of

the above cited case and the facts of the case in hand are different. In the above cited case, it was clearly held that the provisions of Section-55(6)(b) are applicable to the facts of the said case. However, in the instant case, we find that there was nothing in MOU to show that the parties had agreed that there would be charge of the amount paid by the buyer i.e. Plaintiff. On the contrary, if we peruse the said MOU, we find that in Clause-12 it is observed :-

> ***"It is hereby further agreed by the party of the first part that the terms mentioned hereinabove shall be fulfill by him within a period of 2 months from the date of receipt of this agreement failing which the party of the second part shall charge upon the first part by way of compound interest or ------ and same is admitted/agreed by the party of the first part" (Emphasis supplied)."***

12. So, it is very clear that on failure of fulfilling the terms and conditions within stipulated period the compound interest was only to be charged on the amount. If really the parties had an intention to keep the charge of the said amount on the suit property they would have certainly mentioned accordingly, particularly when they had thought of penalizing the

party, committing the breach and protecting other party who has not committed the breach. It would be worthwhile to see what Section-55(6)(b) says :-

> ***"55. Rights and liabilities of buyer and seller :- In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :***
>
> ***.....***
> ***.....***
> ***.....***
> ***.....***
>
> ***(6) The buyer is entitled--***
>
> ***(a) .....***
>
> ***(b) Unless he has improperly declined to accept delivery of the property to a charge on the property, as against the seller and all persons claiming under him, * * * to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission."***

13. In the instant case, it appears from the record that without any just cause the Plaintiff has in fact issued the letter mentioned above and cancelled the agreement. Moreover, he has also admitted that though he received money, he did not return the documents which were with him. So, in a way prima facie it appears that the Plaintiff was in fact not willing to abide the terms and conditions of the MOU. So, in the peculiar facts and circumstances of the present case the provisions of Section-55(6)(b) of T.P. Act can not be invoked into.

14. From the perusal of the order passed by the learned Trial Judge, we find that the Trial Judge has also held that the Plaintiff has suppressed the material fact and has not come to the Court with clean hands. As a result of the same, discretionary equitable relief has been rejected by the Trial Court. There is nothing on record to show that the said order is arbitrary or capricious or is not borne out from the material on record. Under the circumstances, I do not find any reason to interfere with the said order. Hence, I pass the following order :-

O R D E R

Appeal is dismissed with costs.

Interim stay granted earlier is to continue till 15/10/2007.

(S.R. SATHE,J.)